Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1993

Ms. Carroll T. Welch
Superintendent
Clint Independent School District
P.O. Box 779
Clint, Texas 79836

OR93-269

Dear Ms. Welch:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19380.

The Clint Independent School District (the "school district") has received a request for information regarding school district employees who are on administrative leave. Specifically, the requestor seeks:

> 1 - The names, duties and most recent assignments of any and all district employees currently under suspension or on administrative leave.
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> 2 - The work history of any employees currently under suspension or on administrative leave, including, but not limited to, the number of years with the district, previous work assignments and any previous[] disciplinary contact between the employee and his or her supervisors, including, but not limited to, any previous suspensions or placements on administrative leave.
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> 3 - Any and all information on the allegations and/or investigation that have led to the suspension or placement on administrative leave of any employees.
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> 4 - Any and all information on the employment status, work history and current assignment of an employee named Brian May.

You state that the requested information relates to only one employee.

You have submitted for our review 1) a summary of events covering November 10, 11, and 12, 1992, January 18, 20, and 21, 1993, and March 1, 5, 8, 31 (8:00 a.m.), and 31 (1:00 p.m.), 1993; 2) a counselor referral form for one of the students; 3) letters from the suspended employee dated December 1, 1992, January 24, 1993, March 3, and 8, 1993, and April 1, 1993; 4) letters from the school principal to the suspended employee dated January 20, 1993, and March 8, 1993; 5) a letter from the school principal to the school superintendent dated March 8, 1993; 6) handwritten statements from several students; 7) a handwritten memo to the principal dated March 8, 1993; and 8) handwritten letters from two school employees concerning the suspended employee dated December 1992, January 20, 1993, and March 31, 1993. You contend that the information is excepted from disclosure under sections 3(a)(1), 3(a)(2), and 3(a)(3) of the Open Records Act.[1]

Although the attorney general will not ordinarily raise an exception that the governmental body has failed to claim, *see* Open Records Decision Nos. 455 (1987); 325 (1982), we will raise sections 3(a)(14) and 14(e) because improper release of information protected under these sections would violate federal law.

Section 3(a)(14) excepts "student records at educational institutions funded wholly, or in part, by state revenue." Section 14(e) incorporates another source of law, specifically, the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), into the Open Records Act, providing:

> Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974, as enacted by Section 513 of Public Law 93-380, codified as Title 20 U.S.C.A. Section 1232g, as amended.

V.T.C.S. art. 6252-17a, § 14(e); *see also* Open Records Decision No. 431 (1985). FERPA provides the following:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) . . .) of students without the written consent of their parents to any individual, agency, or organization.

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[1]We note that the school district did not submit any documents that are entirely responsive to the information requested in items 1, 2, or 4 for our review. We assume that the information does not exist or has been or will be released to the requestor.

20 U.S.C. § 1232g(b)(1). "Education records" are records which:

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). Sections 3(a)(14) and 14(e) may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a particular student" or "one or both parents of such a student." Open Records Decision No. 332 (1982) at 3. Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure. The handwritten statements from the students concerning the suspended employee, and the counselor referral form *must* be withheld in their entirety as they identify specific students unless you receive written authorization from the legal guardians of the students to release the information. 20 U.S.C. § 1232g(b)(1).[2] For your convenience, we have marked the portions of the remaining documents that must be withheld under section 3(a)(14) and 14(e) unless written authorization is received.

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." FERPA is the only statute that appears to be implicated.[3] *See* V.T.C.S. art. 6252-17a, §§ 3(a)(14), 14(e). *See also* discussion *supra.* In order for information to be brought within the common-law right of privacy under section 3(a)(1), the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

> information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4.

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[2]All of the students in this instance are minors and may not, therefore, authorize the release of the information themselves.

[3]You do not claim that the information is confidential under Family Code section 34.08, which protects "the reports, records, and working papers used or developed in an investigation" performed by the Department of Human Services or a law enforcement agency. Fam. Code § 34.08(a). Because the documents do not on their face indicate that they are confidential under Family Code section 34.08, and you have not supplied us with any other information regarding the application of this provision, we are unable to address whether that section protects the requested information from disclosure.

You contend that "the public interest in disclosure is minimal" and that "[s]chool teachers are not public figures" and that "the privacy interest of the teacher is paramount to any puritan interest that the public may have." We disagree. This office has long held that information relating to the job performance of teachers and school officials is of legitimate public interest. Open Records Decision Nos. 470 at 5 ("[t]he public has a legitimate interest in knowing about serious job-related conflicts between a high school principal and her faculty and staff"); 441 (1986) at 3 ("the public has a legitimate interest in knowing the identities of school personnel who did not pass the TECAT examination"); 41 (1974) (salaries of public school employees is public information). Although the requested information may be embarrassing, the common-law privacy test requires that the information *must also* be of no legitimate public interest. Therefore, you may not withhold the requested information under the common-law privacy doctrine as incorporated into section 3(a)(1) of the Open Records Act.

You also appear to argue that the information is protected under constitutional privacy as it is incorporated into section 3(a)(1). You claim that disclosing the requested information could "harm the individual's constitutional liberty interests, . . . and place him/her in a false light."

Constitutional privacy protects information within one of the zones of privacy as set out by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Paul v. Davis*, 424 U.S. 693 (1976). The zones of privacy include matters related to marriage, procreation, contraception, family relationships, and the rearing and education of children. None of these "zones" are applicable to the requested information. The constitutional right to privacy also protects the individual interest in avoiding disclosure of personal matters. Open Records Decision No. 470 (1987) at 6. The test for constitutional privacy involves a balancing of the individual's privacy interests against the public's need to know information of public concern. Open Records Decision No. 455.

You argue that the public interest in the requested information does not outweigh the privacy concerns of the teacher because the allegations are probably false. As stated above, the public has a legitimate interest in the job performance of teachers and school officials. *See* discussion *supra*. The truth or falsity of a complaint against a public official does not increase or decrease the public interest in the allegation itself or in the way the complaint is resolved. Open Records Decision No. 484 (1987) at 4-5. You have not made a showing that the privacy interest of the teacher outweighs the public interest. Furthermore, false light privacy is not a proper consideration under section 3(a)(1). Open Records Decision No. 579 (1990) (overruling prior decisions to the contrary). You may not withhold the requested information under the constitutional privacy doctrine as incorporated by section 3(a)(1).

Section 3(a)(2) excepts

> information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and transcripts of professional public school employees; provided, however, that nothing in this section shall be construed to exempt from disclosure the degree obtained and the curriculum on such transcripts of professional public school employees, and further provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

Section 3(a)(2) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 3(a)(1). *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled that test to be applied in decision under section 3(a)(2) was the same as that delineated in *Industrial Foundation of the South* for section 3(a)(1)). As we have already determined that you may not withhold the information under that test, you may not withhold the requested information under section 3(a)(2).

Section 3(a)(3) excepts

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You claim that "if the allegations are determined to be true, the District will be moving to terminate the contract of the employee" bringing the information within the purview of section 3(a)(3). In a phone conversation with this office on May 11, 1993, you informed us that the school district has completed its investigation and determined that the charges are unfounded. Accordingly, there is no basis to withhold this information under section 3(a)(3). Therefore, all the documents, with the exception of the counselor referral form, the handwritten statements from the students, and the portions of the documents that have been marked as identifying the students or their parents, must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

Mary R. Crouter

Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/LBC/le

Ref.: ID# 19390
ID# 19738

Enclosures: Marked documents

cc: Mr. Leon Lynn
Education Reporter
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